FILE COPY

Supreme Court of the United States

OCTOBER TERM, 1938

No. 294

CITY OF TEXARKANA, TEXAS ..... *Petitioner*

v.

ARKANSAS LOUISIANA GAS COMPANY ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT, AND BRIEF IN SUPPORT THEREOF.

ED B. LEVEE, JR.
BENJAMIN E. CARTER,
Counsel for Petitioner.

Texarkana, Texas,
August 12, 1938.

SUBJECT INDEX.

(Manuscript Pages)

TABLE OF CASES CITED.

Supreme Court of the United States

OCTOBER TERM, 1938

No.....

CITY OF TEXARKANA, TEXAS.....*Petitioner*

v.

ARKANSAS LOUISIANA GAS COMPANY ..... *Respondent*

PETITION FOR WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

The petitioner, the City of Texarkana, Texas, respectfully shows to this Honorable Court:

A

STATEMENT OF THE MATTER INVOLVED

(1) *Preliminary Statement*

The City of Texarkana, Texas, seeks a review of a decision of the Circuit Court of Appeals for the Fifth Circuit which held to be void and unenforcible a franchise contract between that city and the local gas company, which decision, petitioner contends, is in conflict with the applicable local decisions and with the state statute.

Texarkana, Texas, and Texarkana, Arkansas, form one physical and business community, although there are two municipal corporations. The state line runs along a main street. The respondent gas company operates one distributing plant serving both cities. It operates in the Texas city under a franchise. It could not use the streets without the consent of the city. As a consideration for the grant of this franchise, respondent promised that it would give the consumers in Texas the benefit of any lower rates it might be compelled to place in effect in Arkansas. The enforcibility of this promise is the principal matter involved. The suit was tried on the pleadings. The facts are not disputed.

For most of the period covered by this suit, the

company has been compelled to charge lower rates in the Arkansas city. It has refused, and now refuses, to keep its promise and to give the benefit of such lower rates to the consumers in the Texas city. The object of this suit is to compel it to do so.

The suit was begun in the state court and was removed to the Federal court, upon the order of the Federal court. The Federal District Court held (without opinion) the contract to be valid and that it applied to a part of the period in controversy. The Circuit Court of Appeals has now decided that a Texas city cannot enforce such a promise against a utility. This, the petitioner contends, is a decision of an important question of Texas law in conflict with the applicable decisions of the Supreme Court of Texas and in conflict with the city charter, which is a special act of the state legislature. That court also said, without explanation, that the promise, if binding, was not applicable here. This, petitioner contends, is an erroneous interpretation of the meaning of the contract. A review of the same will not involve this court in a study of disputed facts. Important rights of the particular consumers are involved. In view of the great cost and difficulty of rate investigations and litigation, the question whether a city and a utility can or cannot make valid agreements against rate discrimination is a question

of sufficient general importance to warrant this court in considering a case in which it arises, even though this court is, of necessity, disinclined to review on certiorari the interpretation of contracts and their application to even undisputed facts. Further, if the state law authorizes the people of a city to protect themselves by a franchise against rate discrimination and if they have done so, it is not an unwarranted use of the time of this court for this court to determine whether such people have been deprived of such protection, and forced into expensive and difficult rate litigation, through an erroneous interpretation by a Federal court of the franchise provision.

(2) *Statement of Facts.*

In 1930, respondent had pending in Texarkana, Texas, a contested application for an increase in rates. Its existing franchise was about to expire (R. 123). A compromise as to higher rates was agreed upon (R. 13 and 125), to be embodied in a new franchise. This new franchise provided, in part (R. 18):

> "If Grantee shall be finally compelled to, or should voluntarily, place in any rates in the City of Texarkana, Arkansas, less than the rates granted by this Ordinance then and thereupon the lessened rate shall apply in the City of Tex-

arkana, Texas, and Grantee shall not be authorized or permitted to charge and collect any higher rate."

The franchise provided (R. 18) that it must be accepted by the company in writing, and on June 17, 1930, (R. 19) the company accepted same "with its terms and provisions."

The city charter (R. 165) provides that in the event any franchise fails to provide that all agreements therein are subject to the right and privilege of the city council to regulate rates, it shall be considered that such stipulation is nevertheless a part and parcel of the contract and franchise just as though written therein. The city charter is a special act of the legislature (R. 123).

Prior to the new franchise of 1930, gas rates in both cities were the same. An increase in Arkansas, similar to that in Texas, was obtained by agreement with the City Council. This agreement was subject to the referendum, and petitions for a referendum were filed. The Arkansas constitution provides that where such petitions are filed the measure so referred shall remain in abeyance until the election be held, but the increased rates were nevertheless put in effect in Arkansas and collected until December 1, 1933. Litigation, which the company brought to this

court (see *Southern Cities Distributing Co. v. Carter*, 285 U. S. 525), delayed the election, which was held in May, 1932. The agreement for an increase was rejected. On the day of the election, the gas company filed suit in the Federal court in Arkansas to prevent the election from having any effect, and obtained a temporary injunction. The gas company finally lost this suit. See *Texarkana v. Southern Cities Distributing Company*, 64 Fed. (2nd) 944. This court denied certiorari on October 9, 1933, and denied a rehearing on November 13, 1933. See same case under reverse title in 290 U. S. 650.

After the mandate got back, the District Court in Arkansas, on December 1, 1933, entered its final decree (R. 68), which (R. 72) ordered the gas company to restore the old (lower) rates in Arkansas, and, R. 75-78, gave judgment to the consumers in Arkansas for all amounts collected in Arkansas under the increased rates of 1930 over and above the amounts which would have been due under the old or lower rates. Refunds were made and the lower rate placed in effect as of December 1, 1933.

The company has collected the higher rates in Texas at all times since June, 1930.

The Texas city council, on Dec. 12, 1933 (R. 177), (R. 89-90) ordered the company to comply with its

franchise. The order is set out, in part, at R. 177 and at R. 361. It directed the lower Arkansas rates to be put in effect and that refunds be made to the Texas consumers similar to those made in Arkansas.

In the meantime, after this court denied certiorari and while the petition for rehearing thereon was pending, the company, on October 23, 1933, R. 365, applied in Arkansas for much higher rates. Full hearing was held and, on Dec. 22, 1933, the Arkansas city council denied the application. The company on Feb. 9, 1934 (R. 365) notified the city it would apply for an injunction against the order of December 22, 1933, refusing an increase. Such suit was filed in the Federal District Court in Arkansas on Feb. 16, 1934, and a temporary order was obtained protecting the company in charging the much higher rates it had applied for. The trial of this suit lasted until December 4, 1936, (R. 188) when the restraining order was dissolved by the District Court, the bill dismissed and judgment given the consumers for all amounts collected in excess of the old and lower rate. The judgment for refunds was superseded pending appeal, but a temporary injunction pending appeal was denied. Since December 4, 1936, the gas company has been collecting the old rate in Arkansas,—a rate much lower than the one in Texas. This de-

cree has been affirmed by the Circuit Court of Appeals for the 8th Circuit, and petition for certiorari is now pending in this court (No. 72, October Term, 1938).

The importance to the public of the decision of the Circuit Court of Appeals in this Texas case is brought out by the history of this Arkansas case. The City of Texarkana, Texas, and the gas company agreed on a simple means of avoiding discrimination as to rates. Now the lower court in this case says no such agreement can be enforced. There should be some way of avoiding such a long, dreary and expensive rate contest as the one in Arkansas, a contest that cannot be finally decided much before its fifth birthday,—one that stayed two years and ten months in the district court, and remained in the Circuit Court of Appeals until May, 1938, one year and five months after the District Court decided it.

The situation as to rates in Texarkana, Arkansas, and Texarkana, Texas, has been this:

Prior to June 17, 1930, the same rate (45c net) was collected on both sides of the state line.

From June 17, 1930, down to the present, the compromise rate ($1.00 for the first MCF each

month and 47½c net for all above that) has been collected in Texas.

In Arkansas, the rates have been:

From June, 1930, to Dec. 1, 1933, the same compromise rate was collected as in Texas, but under the decree of December 1, 1933, refunds down to the 45c rate were made for this entire period.

On Dec. 1, 1933, the company was compelled by the final decree in the first Arkansas suit, to put the lower 45c rate in effect in Arkansas and this remained until Feb. 16, 1934, when the second Arkansas suit was filed and the temporary injunction obtained.

From. Feb. 16, 1934, to Dec. 4, 1936, the company collected much higher rates in Arkansas under a temporary restraining order, which order was then dissolved and refunds then were ordered down to the old 45c rate for this entire period. These refunds was superseded, pending an appeal not yet finally disposed of.

From Dec. 4, 1936, down to the present the company has been actually collecting the 45c rate in Arkansas while it has continued to collect the higher rate in Texas.

(3) *Decision of the District Court*

This present suit, an attempt on the part of Texarkana, Texas, to enforce the non-discrimination contract of the company, has been pending since December, 1933 (R. 26). It was decided in the District Court, without opinion, on July 31, 1937 (R. 237). That court held (R. 231-237):

1. That the disputed clause of the franchise was binding and should be enforced.

2. That the lower 45c rate should have gone into effect in Texas on Dec. 1, 1933, and remained until Feb. 16, 1934, the period when it was used in Arkansas under the decree of the Arkansas District Court. Refunds to such basis were ordered for this period.

3. That the contract did not apply to the period prior to Dec. 1, 1933, and the bill was dismissed with prejudice in so far as it sought refunds in Texas for that period similar to the ones the company was compelled to make in Arkansas.

4. That the bill should be dismissed, without prejudice to a later suit after the second Arkansas case was decided, in so far as it sought any relief for the period since Feb. 16, 1934,—the date of entry of the

temporary restraining order in the second Arkansas case.

The gas company appealed from the decree in so far as it held the contract valid and ordered refunds for the period from Dec. 1, 1933, to Feb. 16, 1934.

The city appealed from the decree denying relief for the period prior to Dec. 1, 1933. It also contended that its prayer for relief for the period since Feb. 16, 1934, should not have been dismissed with leave to file a new suit but should have been held for final disposition later.

(4) *Decision of the Circuit Court of Appeals.*

The opinion of the Circuit Court of Appeals (R. 423) was filed June 3, 1938. Petition for rehearing was duly filed and was denied on July 19, 1938, (R. 455).

That court decided that the franchise clause was completely invalid, and that, if valid, it was without application here.

No explanation was made as to why the clause, if valid, was without application, at least to the period from Dec. 1, 1933, to Feb. 16, 1934, when the gas company, under a direct and explicit order of a Federal District Court, was compelled to charge a lower rate in Arkansas.

The decision that the clause was completely invalidates as petitioner understands, upon the following theories:

1. A Texas city, whose city council is endowed with the power to regulate rates, cannot by contract bind its city council not to exercise those powers. This is undisputed.

2. The franchise provision that if lower rates be put into effect in Arkansas they shall apply in Texas and that the company shall not charge higher rates in Texas than in Arkansas, amounts to an attempt to bind the hands of the city council not to raise the rates above the Arkansas rates and is a complete abdication of its ratemaking function. This, the petitioner contends is error for several reasons:

A. It is a most unnatural and strained construction of the clause,—one which the petitioner would have regarded as impossible but for the opinion below, and one not advocated by the respondent, whose argument was that the clause was void for want of mutuality because the city could not and did not make it a counter promise about rates.

B. The decision is in conflict with the only applicable decision of the Supreme Court of Texas.

C. The decision, in so construing the clause, dis-

regards the City Charter (a special statute of the state legislature), which provides that the reserved privilege of the city council to regulate rates must be considered to be a part of every agreement between the city and a utility.

(5) *Other Facts.*

There are other facts set forth in the pleadings which petitioner does not regard as material and which were not relied upon by the court below in its decision, but which are here summarized because relied upon by the respondent in the lower court.

On November 4, 1933, R. 171, the gas company applied to the Texas City Council for an increase in rates, similar to that applied for in Arkansas. The Council passed a resolution for a hearing, without waiving the city's franchise rights but to determine whether the company should be relieved from its promise. After a full hearing the Council, on Jan. 23, 1934, (R. 181) made an order finding that the 45c rate then in effect in Arkansas was sufficient to pay all expenses, depreciation and return in Texas, and refusing to grant any relief from the contract or to increase rates and ordering the City Attorney to continue his efforts to force the company to comply with its promise and place the 45c Arkansas rate in effect in Texas.

The company, on March 3, 1934, appealed (R. 183) to the Texas Railroad Commission from this order of Jan. 23, 1934, and from the order of Dec. 12, 1933, which had first called upon it to place the lower Arkansas rate in effect. The Commission required the company to file a $10,000.00 bond, which the company refused to file. The matter went no further.

The company in its pleadings in this case in the District Court, besides attacking the validity of the franchise clause against discrimination, pleaded that any rate lower than the rate asked for by it on November 4, 1933, was confiscatory. The city moved to strike the answer. This was the record on which the District Court decided the case. The motion to strike was granted and, the gas company not desiring to plead further, the District Court entered its decree as above stated (R. 233).

B.

REASONS RELIED ON FOR THE ALLOWANCE OF THE WRIT.

1. The Circuit Court of Appeals, in interpreting the non-discrimination clause of the franchise as an attempt to bind the city council not to exercise its rate making powers, refused to obey the plain man-

date of the statute and so placed on the franchise an interpretation which it cannot bear under the state law, which erroneous interpretation is given by that court as its reason for holding the clause invalid.

The city charter, an act of the State Legislature, provides (R. 165) that every franchise must set forth that the council shall have the right to regulate rates, and that, if such stipulation be omitted it shall be considered to be part and parcel of the franchise just as though written therein. Under this statute the clause in question must be interpreted to read that the company will give the Texas city the benefit of any lower rate it may be compelled to use in Arkansas, "provided this agreement is subject to the right and privilege of the city council to regulate and fix the rates." Under the statute, the clause in question cannot bear the interpretation, placed on it by the Circuit Court of Appeals, that it is an attempt to bind the council not to raise the rates above the Arkansas level even though the council might find the Arkansas rates to be too low.

The construction of the franchise adopted by the lower court is a strained, unnatural and erroneous construction. The respondent argued below that the clause was void, as a matter of contract law, because

the city could not, and had not attempted to, make to the company any counter promise as to rates.

2. The Circuit Court of Appeals, in deciding that the non-discrimination clause of the franchise was invalid, decided an important question of local law in a way probably in conflict with the applicable local decisions.

In *Dallas Railway Company v. Geller*, 271 S. W. 1106 (1925) the Supreme Court of Texas, in discussing the validity of a franchise agreement for a maximum fare, between a street railway and a Texas city, which city was endowed with the power to regulate rates, said:

> "The right or power to further control and regulate the grant in regard to the rate schedule is a reservation to the municipality, *and not an inhibition to contract;* and, where a franchise is accepted by a grantee, this reservation provided in the law becomes a part of the contract."

This is an essentially similar case, and the Circuit Court of Appeals has here held that the fact that the city council does have the power to regulate rates is an inhibition to contract, and that the reservation provided in the law does not become a part of the contract against discrimination and hence that the

contract is void because, as erroneously construed by that court, it is an attempt to bind the city council not to exercise its rate making powers.

3. The Circuit Court of Appeals, in deciding that a city cannot, by a franchise or contract provision, bind a utility not to discriminate against its local consumers, has decided an important question of general law in a way probably untenable and probably in conflict with the weight of authority.

A few cases are discussed in the brief. In the *Los Angeles Street Railway Case*, 280 U. S. 145, Mr. Justice Brandeis said, 280 U. S. 162, that the theory that a utility could not be bound by an agreement as to rates because the city could not bind itself on the same matter was a conclusion which, "is not commanded by logic or by the law of contracts." In the same case Mr. Justice Stone said, 280 U. S. 167, that no principle of the law of contracts, *qua* contracts, would preclude a railway company from binding itself to a definite rate even though the city could not similarly bind itself.

4. The importance of the questions involved justify this court in considering whether the Circuit Court of Appeals erred in determining that the nondiscrimination clause of the franchise if valid, is not

applicable to the facts of this case. The Circuit Court of Appeals erred in holding that the clause was not applicable to any of the period covered by this suit, and the District Court erred in holding that it was not applicable to the period prior to December 1, 1933. Petitioner is entitled to a decree giving to its consumers relief for the entire period prior to Feb. 16, 1934, and permitting it to sue for relief for the period after that date when the pending Arkansas case is settled.

PRAYER.

WHEREFORE, the City of Texarkana, Texas, prays that a writ of certiorari be granted herein to the United States Circuit Court of Appeals for the Fifth Circuit, in cause No. 8646 on its docket, entitled *Arkansas Louisiana Gas Company v. City of Texarkana, Texas,* (And Reverse Title); that said cause be here reviewed and determined; and that the judgment of said court herein be reversed, the judgment of the district court corrected as above set forth, and for such further relief as may be found proper.

This the twelfth day of August, 1938.

Ed B. Levee, Jr.
Benjamin E. Carter,
Counsel for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

I.

THE OPINIONS OF THE COURT BELOW

The district court did not file an opinion. The opinion of the Circuit Court of Appeals, appearing at R. 423, has not been officially reported when this brief is written. It is reported in 97 Federal, 2nd, at page 5 (advance opinions).

II.

JURISDICTION.

(1) The statutory provision which is believed to sustain the jurisdiction of this court is Section 240 of the Judicial Code, including the amendments thereof, Title 28, U. S. Code, Sec. 347.

(2) The decree of the Circuit Court of Appeals was entered on June 3, 1938 (R. 433). The petition for a rehearing was denied by that court on July 19, 1938 (R. 455). The petition for certiorari is to be filed on or about August 24, 1938.

(3) The nature of the case has been stated in the foregoing petition. The case resulted in a final judgment and decree in the Circuit Court of Appeals which appears in the record at page 433.

(4) Under the statutory provisions above referred to this court has jurisdiction to review on certiorari the final judgment of the Circuit Court of Appeals in any case and it is not believed to be necessary to cite any cases to sustain the jurisdiction of this court.

III.

STATEMENT OF THE CASE.

The case has already been stated in full in the preceding petition under heading "A" and the statement therein set forth is hereby adopted and made a part of this brief and in the interest of brevity, is not here repeated.

IV.

SPECIFICATION OF ERRORS.

1. The Circuit Court of Appeals erred in finding and holding that the disputed non-discrimination clause is invalid.

2. The Circuit Court of Appeals erred in holding that said clause, if valid, is without application to the facts of this case, and the District Court erred in refusing to apply it to the period prior to December 1, 1933.

3. Petitioner also adopts, as errors to be urged, the reasons set forth under "B" in its petition for the allowance of the writ.

V.

ARGUMENT.

SUMMARY OF ARGUMENT.

A. The Circuit Court of Appeals in interpreting the non-discrimination clause of the franchise as an attempt to bind the City Council not to exercise its rate making powers, refused to obey the plain mandate of the statute and so placed on the franchise an interpretation which it cannot bear under the state law,—which erroneous interpretation is given by that Court as its reason for holding the clause invalid.

B. The Circuit Court of Appeals, in deciding that the non-discrimination clause of the franchise was invalid, decided an important question of local law in a way probably in conflict with the applicable local decisions.

C. The Circuit Court of Appeals in deciding that a city cannot, by a franchise or contract provision, bind a utility not to discriminate against its local consumers, has decided an important question of general law in a way probably untenable and in conflict with the weight of authority.

D. The importance of the questions involved justify this court in considering whether the Circuit Court of Appeals erred in determining that the non-intervention clause of the franchise, if valid, is not applicable to the facts of this case, and in determining whether it is applicable to the entire period prior to Feb. 16, 1934.

ARGUMENT.

A.

The Circuit Court of Appeals, in interpreting the non-discrimination clause of the franchise as an attempt to bind the City Council not to exercise its rate making powers, refused to obey the plain mandate of the statute and so placed on the franchise an interpretation which it cannot bear under the state law,—which erroneous interpretation is given by that Court as its reason for holding the clause invalid.

The clause in question reads as follows (R. 18):

> "If grantee shall be finally compelled to, or should voluntarily, place in any rates in the City of Texarkana, Arkansas, less than the rates granted by this ordinance, then and thereupon the lessened rate shall apply in the City of Texarkana, Texas, and grantee shall not be author-

ized or permitted to charge and collect any higher rate."

The franchise was agreed to by the company (R. 19).

The petitioner contends that the legislature of Texas has commanded that this clause be interpreted with the following proviso (not quoted from the statute), or one of similar import, as a part and parcel thereof:

> "**** provided, the council shall have the right and privilege of fixing and regulating rates from time to time as authorized and commanded by the City Charter."

The City Charter is a special act of the legislature (R. 123). It provides in Section 196 (R. 166) that the city council shall have the power to regulate rates. Section 163 (R. 165) commands that every franchise "must expressly set forth that the council shall have the right and privilege of ***** fixing fares, rates, tolls and charges ****". Section 163a (R. 165) provides that in the event the franchise shall not contain such a provision "**** it shall, nevertheless, be considered that all the said stipulations contained in said Sections *** 163 *** are part and parcel of the said contract and franchise, just as though writ-

ten therein, and the said applicant so accepting such franchise **** shall be held and firmly bound thereto, notwithstanding such ommissions."

The Circuit Court of Appeals has refused to follow such legislative command. It has said that the clause is void because the clause is an attempt to bind the city council not to exercise its rate regulating powers. Aside from the statute, this is an erroneous interpretation of the franchise. In view of the statute, such a meaning cannot be placed upon the franchise without a plain violation of the statute.

When a lower Federal court refuses to apply a state statute, it is a proper function of this court to grant certiorari to correct such an error.

If the Charter command be heeded, the franchise cannot bear the interpretation made by the lower court. This interepretation is the sole assigned reason for the decision below that the clause is invalid.

B.

The Circuit Court of Appeals, in deciding that the non-discrimination clause of the franchise was invalid, decided an important question of local law in a way probably in conflict with the applicable local decisions.

An almost exactly similar question was discussed

by the Supreme Court of Texas in the case of *Dallas Street Railway Co. v. Geller*, 271 S. W. 1106 (1925), reported below in 245 S. W. 254 (Court of Civil Appeals at Dallas). The opinion in the Supreme Court is by that court itself,—not by one of its Commissions of Appeal. The opinions do not show exactly how the issues got before the court, and for that reason petitioner has consulted the briefs in the case.

In 1917, the City of Dallas, Texas, granted a franchise to the street railway, which was accepted by it, which contained an agreement for a maximum fare of five cents. That city operates under a charter which vested in the board of commissioners the power to regulate rates. In 1922, the railway asked for an increase in rates and the Commissioners granted an increase for a period of one year. The briefs show that the commissioners, in granting the increase, specifically saved the contract rights of the city to a maximum fare of five cents and provided that the increase was temporary, to meet an emergency, and that at the end of the year the company should return to the five cent fare.

Thereafter one Geller, a citizen, taxpayer and customer of the street railway, brought suit against it to enjoin the increase. The city was not made a party. He claimed that the franchise was a contract

and that the company was violating the contract in charging more than five cents because the action of the commissioners in granting an increase was subject to the referendum and such action had been taken in such a way as to prevent a referendum. The city seems not to have been in the case until after the Court of Civil Appeals acted upon it.

The trial court simply dismissed Geller's suit, and he appealed to the Court of Civil Appeals. The Court held that the franchise was not a contract, that a city whose council had the power to regulate rates could not bind a utility as to rates by a contract, but that the grant of the increase was subject to the referendum and that one should be held.

The street railway appealed to the state Supreme Court. It expressed itself as satisfied with the holding that it could not be bound by an agreement as to rates, but it sought reversal of the holding as to the referendum.

At this stage the City Attorney of Dallas filed a brief as *amicus curiae* seeking to protect the contract rights of the city to the five cent fare. He was joined by the city attorneys of a number of other Texas cities. They all asked the Supreme Court to reverse the holding that a city endowed with the power to regulate rates could not make a contract as to rates

which would bind a utility even though the city did not try to bind its council or board not to exercise the rate making power given it by statute.

While the case was pending, one of the Commissions of Appeals of the Supreme Court decided the case of *Uvalde v. Uvalde Elec. & Ice Co.*, 250 S. W. 140. In that case the city had obtained a promise as to rates from the utility by giving in return therefor its express promise that such rates would be maintained for a number of years. The city council had the power to regulate rates and the Commission of Appeals held the contract void. It also argued that a utility could not be bound by such a contract with a city whose council had such powers, even though the city did not attempt to bind its city council,—in other words that such a city could not buy such a promise from a utility for any consideration.

At that time the Supreme Court of Texas had the custom, in many cases, of adopting the recommendation of its commissions of appeals as to the judgment to be entered without approving the reasoning by which the commission reached its conclusion. The opinion was not regarded as a precedent unless expressly approved by the Supreme Court, and the questions discussed were regarded as open questions. An example of the formula used to approve an opin-

ion written by a commission is found at the end of the case of *Pullman Co. v. Hayes*, 271 S. W. 1108 at 1110, Another example is at the end of the case which follows the Uvalde case in 250 S. W. (see p. 148). In the Uvalde case, the Supreme Court did not approve the opinion but adopted the judgment recommended by its commission.

As stated, the opinion of the Commission in the Uvalde case came out while the Geller case was pending in the Supreme Court and briefs were filed arguing the effect of that case.

Such was the situation before the Supreme Court of Texas when it wrote its opinion in the Geller case. The utility had promised a certain maximum fare. The city had made no counter promise as to rates. The Court of Civil Appeals in that case had held that such a contract could not bind the utility, and this point had been briefed by various city attorneys as *amici curiae* and the court had been confronted with the unapproved opinion of its commission in the Uvalde case. In these circumstances, the Supreme Court of Texas said, 271 S. W. 1106:

> "Perhaps the city attorneys, *amicus curiae*, are unduly or unnecessarily alarmed, construing, as they do, the opinion of the honorable Court of Civil Appeals to hold that a municipality cannot

make contracts that are binding upon public service corporations."

The Supreme Court then discussed various cases cited by the lower court to the effect that the legislative power to regulate rates was limited by the due process clause, and that this power could not be bartered away. The court then said (271 S. W. 1107):

> "The right or power to further control or regulate the grant (of a franchise) in regard to the rate schedule is a reservation to the municipality and not an inhibition to contract; and, where a franchise is accepted by a grantee, this reservation provided in the law becomes a part of the contract."

The Supreme Court went on to hold that the grant of the increase was an exercise of the regulatory powers granted by the charter and that the lower court was in further error in holding it was subject to a referendum, and reversed the judgment.

Petitioner believes that this opinion of the Supreme Court of Texas establishes the law in Texas to be that the existence of the powers of the city council to regulate rates is "not an inhibition to contract," but is a "reservation to the muncipality," and that the Circuit Court of Appeals has in this case held "that

a municipality cannot make contracts that are binding upon public service corporations," and in so doing it has decided an important question of local law in a way probably in conflict with the applicable local decisions and probably in conflict with the way the state courts would have decided this case,—a case begun in the state courts and removed under the authority of the Federal statutes to the Federal courts. The Circuit Court of Appeals has certainly refused, in the face of the charter and of this decision, to treat the existence of the regulatory power as a reservation in the contract, and has treated such power as an inhibition to contract when the Supreme Court of Texas has said it is not. The question whether a Texas city can make a contract as to rates which will bind a utility is certainly an important question of local law. It is squarely presented in this case. The Supreme Court of Texas has clearly stated its opinion to be just the opposite of the conclusion reached by the Circuit Court of Appeals in this case. Petitioner urges that the case is one in which both the Federal statute and the rules of this court contemplate that certiorari should be granted.

C.

The Circuit Court of Appeals in deciding that a city cannot, by a franchise or contract provision,

bind a utility not to discriminate against its local consumers, has decided an important question of general law in a way probably untenable and in conflict with the weight of authority.

Petitioner does not know whether, after the decisions of this court in *Erie Railway Co. v. Tompkins*, April 25, 1938, (82 L. ed., Adv. Op. 787) and *Ruhlin v. New York Life Ins. Co.*, May 2, 1938, (82 L. ed. Adv. Op. 823), there can be an important question of "general" law as distinguished from the applicable local law, but petitioner desires to remind this court of a few of its own decisions which indicate strongly that a utility may be bound by a franchise agreement as to rates even though the city cannot bind itself to maintain the same rates.

In *Henderson Water Co. v. Commission*, 260 U. S. 278, the utility was held bound by a contract as to rates until it might be relieved therefrom by the rate making body,—in that case a state commission. Here the rate making body is the city council,—not the city, but the officers who are members of its council. That rate making body, after full hearing and extensive investigation, has refused to relieve the utility of its agreement.

In *Southern Utilities Co. v. Palatka*, 268 U. S. 232, this court held that the fact that the legislature,

or a state commission, might regulate rates notwithstanding a rate contract did not destroy the binding effect of the contract between the parties when it is left undisturbed, and this court left open the question whether such a contract might not bind the utility even if it left the city free.

Petitioner has already, in the petition, quoted the remarks of Justices Brandeis and Stone in the *Los Angeles Street Ry. Case*, to the effect that the utility may be bound as to rates even though the city cannot make it a counter-promise on the same subject matter. Justice Butler, speaking for the majority in that case, at 280 U. S. 152, held that the question whether the city could make such a contract was a matter of state law, and decided the issue in that case as such a matter. Under heading "2" of the court's division of its opinion (280 U. S. 156), it proceeded on the assumption that there was such a contract and held that, if there was, it had been abrogated.

The case of *Knoxville v. Knoxville Water Co.*, 189 U. S. 434, presented a case where a city did have rate making powers and did not undertake to waive any of its rate making powers, but the utility did bind itself to a maximum rate. This court said (189 U. S. 436-437):

"People who have accepted, as experience shows that people will accept, a charter subject to such liabilities, cannot complain of them or repudiate them, nor can the company which they have formed."

The Knoxville case is also in point in connection with the manner in which the lower court in this case interpreted the contract. There was not there, and there is not here, any express attempt to bind the city. The company was notified by statute of the rate making power of the city, just as here it was notified by statute of the powers of the city council. In the Knoxville case, this court said (189 U. S. 437):

"In the present case it seems to us impossible to suppose that any power to contract which the City may have had was intended to be exercised in such a way as to displace the municipal power expressly reserved or given by the general law."

D.

The importance of the questions inolved justify this court in considering whether the Circuit Court of Appeals erred in determining that the non-intervention clause of the franchise, if valid, is not applicable to the facts of this case.

Petitioner believes that if this court should conclude that the city and the consumers therein do have a valid contract, the importance of the questions involved justify this court in taking sufficient time to see whether the contract is applicable to the situation here. The judgment of the Circuit Court of Appeals now stands as an adjudication that a Texas city with rate regulating powers cannot bind a utility as to rates. This court knows that most utilities manage to be foreign corporations and, with this decision of the Circuit Court of Appeals as a precedent, that every case involving such a contract in Texas will wind up in the Federal Court. The Supreme Court of Texas has in the Dallas Case, hereinbefore discussed, indicated that a city may bind a utility as to rates by a franchise agreement. The Dallas Case also indicates that there probably are numerous franchise agreements which may involve this question.

An investigation by this court as to whether the contract, if valid, applies to the facts here involved will not engage this court in a study of disputed facts. The facts are simple and have been heretofore stated. The question is one as to the meaning of the discrimination clause in the franchise. The Circuit Court of Appeals did not indicate why it thought the clause was not applicable, but the argument

which was presented to it by the gas company was to the effect that, even though it was compelled to lower its rates in Arkansas by a decree of a District Court of the United States, it was not finally compelled to lower them because at the time this decree was rendered it had pending in Arkansas an application for an increase in rates. As petitioner understands it, the contention is that the clause will never be applicable in any case where, after an appellate court has acted and before its mandate can be obtained so that the lower court may enter a final decree, the company has again applied for an increase in Arkansas. As this is written, there is now pending in this court an attempt on the part of this same company to set aside another decree of the Federal Court in Arkansas which in substance compels it to use a lower rate in Arkansas than in Texas. If this court should refuse certiorari in that case and if the gas company should start a new rate proceeding in the rate tribunal in Arkansas before the mandate could be obtained, then the contention would be that the gas company has not yet been finally compelled to use lower rates in Arkansas. This is the only basis petitioner knows of upon which it could be contended that the non-discrimination clause in the Texas franchise is not applicable to at least a part of the time covered by this suit, and it is petitioner's contention that the Circuit

Court of Appeals erred in deciding, without any discussion, that the clause, if valid, does not apply to the facts of this case.

Petitioner further contends that any such application of the franchise is erroneous and that it was the intention of the parties in making this agreement that, whenever it was finally decided that Arkansas was entitled to a lower rate, Texas should obtain the benefit of this lower rate in the same manner that Arkansas obtained the benefit of it, and if this court decides to grant certiorari petitioner respectfully asks that the case be brought up in such a manner that it may present its contentions that the consumers in Texas are entitled to the same benefit from the lower rates that the Arkansas consumers receive or may receive for the entire period. Whether or not, however, this court feels that it can take the time necessary to grant complete relief, it is petitioner's earnest contention that the decision of the Circuit Court of Appeals that the clause is not applicable is manifestly and plainly in error for a period of at least two and a half months of the time covered by this suit, and that as to this period at least the importance of the question involved urge that this court should grant certiorari.

CONCLUSION.

It is, therefore, respectfully submitted that a writ of certiorari should be granted, that the decision below should be reviewed and reversed, and that the city be granted such relief as is necessary to give them for the entire period covered by the suit the same benefits from lower rates as the Arkansas consumers have enjoyed.

Ed B. Levee, Jr.
Benjamin E. Carter

ED B. LEVEE, JR.
BENJAMIN E. CARTER,
Counsel for Petitioner.